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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 384

INTER-CITY ADVERTISING CO., OF GREENSBORO, N. C., INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 176-178) is reported at 190 F. 2d 420. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1-53) are reported at 89 NLRB 1103.

JURISDICTION

The judgment of the court below was entered on July 16, 1951 (R. 179). The petition for a writ of

certiorari was filed on October 15, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 151, *et seq.*), appear in the Appendix, *infra,* pp. 11-13.

QUESTIONS PRESENTED

The union representing a majority of petitioners' employees made repeated requests to bargain, all of which were ignored by petitioners, who, without questioning the union's majority or the appropriateness of the unit, immediately embarked on a campaign of unfair labor practices designed to destroy the union. The question presented is whether in these circumstances petitioners may thereafter escape liability for their refusal to bargain because (1) the union was not certified by the Board, or (2) the bargaining unit involved was larger than that certified as appropriate by the Board several years earlier.

STATEMENT

Following the usual proceedings under the Act, the court below approved the Board's findings that petitioners [1] had violated Sections 8 (a) (1), (3),

[1] Petitioners are Inter-City Advertising Company of Greensboro, N. C., Inc., and Inter-City Advertising Company of Charlotte, N. C., Inc. These two corporations and Inter-City Advertising Company of Columbia, S. C., Inc., are suc-

and (5) of the Act by threatening, interrogating, and spying upon their employees because of the latter's union activities, by discharging or demoting four employees because of their union membership,[2] and by refusing to bargain with Local 1229, International Brotherhood of Electrical Workers, A. F. L., hereinafter called the Union. Petitioners challenge the decision below only in so far as it upholds the Board finding that petitioners illegally refused to bargain.

A. The Facts as Found by the Board

On February 11, 1949, the two studio operators and three of the four transmitter operators at petitioners' radio station WAYS at Charlotte, North Carolina, signed applications for membership in the Union and paid all or part of their initiation fees (R. 22; 60) [3] On February 15, three of the

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cessor companies to Inter-City Advertising Co., Inc., a North Carolina corporation, which owned and operated radio stations WAYS at Charlotte, North Carolina, WCOG at Greensboro, North Carolina, and WKIX at Columbia, South Carolina, until a corporate reorganization was effected on May 1, 1949 (R. 17; 83-84). This reorganization was entirely a matter of business convenience and involved no basic change in ownership, management, or operations (R. 17; 56-57). Petitioners stipulated that with respect to each of the stations the predecessor company and the successor companies may be considered as one and the same (R. 17; 82-83).

[2] The court below found that a fifth employee, a supervisor, was likewise discharged for union activities, and not—as the Board found—for refusing to spy on the union activities of the rank and file (R. 178). The Board is not seeking review of this aspect of the decision below.

[3] Where in a series of references a semicolon appears, references preceding it are to the Board's findings, and those following are to the supporting evidence.

four operators at petitioners' radio station WCOG at Greensboro, North Carolina, likewise signed membership applications and paid their initiation fees (R. 26-27; 61-62).

The Union promptly notified petitioners that with respect to each station it represented a majority of the employees, and asked for bargaining conferences, but petitioners ignored the Union's overtures. On February 12, 1949, the Union wrote petitioners' General Manager Goan that it represented the WAYS technical employees and that it had filed with the Board a petition for certification as collective bargaining agent of these employees (R. 42-43; 105). Goan did not answer this letter. On Tuesday morning, February 15, Clifford T. Lee, an international representative of the Union, telephoned Goan and requested a bargaining conference (R. 43; 75). Goan told Lee to call him back in the afternoon, but although Lee called back several times he could not reach Goan, who was in the studio all afternoon but was not accepting telephone calls (R. 43; 75, 82). By registered letter dated April 6, 1949, the Union again notified Goan that it represented a majority of the WAYS technical employees and requested "an early collective bargaining conference" (R. 43; 107). Goan did not reply to this letter.

The Union by letter dated February 17, 1949, also notified Goan that it represented the technical employees at WCOG and requested a collective

bargaining conference (R. 43; 106). Again Goan failed to answer the Union's letter (R. 43; 62).

In February, during the period in which petitioners were ignoring the Union's requests for bargaining conferences, they were engaged in a campaign of unfair labor practices, including the discriminatory discharge or demotion of five employees (one a supervisor), and numerous other acts of interference, restraint, and coercion (R. 19-35). As a result of this campaign General Manager Goan was able to tell an employee on February 19, "I don't care what you boys do in your Union. I have got this Union licked now anyway," and to announce to the employees late in March that "there is no union at WAYS, and to my knowledge there will never be one" (R. 28, 29; 78, 99).

B. The Board's Conclusions of Law

Upon the foregoing facts, the Board concluded that petitioners had illegally refused to bargain with the Union in violation of Section 8 (a) (5) and (1) of the Act. In so holding the Board rejected petitioners' contentions that a unit of studio and transmitter operators was not appropriate for collective bargaining and that petitioners had the right to await Board certification of the Union before bargaining (R. 7-9, 39-44).

With respect to the unit, the Board recognized that in previous cases in 1944 and 1945 involving station WAYS, a unit comprising transmitter operators alone had been found appropriate in ac-

cordance with the then prevailing practice of the Board (R. 7). However, the Board observed that more recently it had been including transmitter and studio operators in the same unit, and that since there had been no collective bargaining in the unit previously found appropriate, it was free to find the broader unit appropriate (*id.*). The Board found no merit in petitioners' contention that they could await certification of the Union before bargaining, noting that petitioners upon learning of the representation petition had "engaged in unfair labor practices, including the discriminatory discharge of union adherents, clearly designed to make a free election impossible" (R. 9). The Board concluded that petitioners' "failure to reply to the Union's requests for bargaining was not motivated by any bona fide doubt as to its majority, but by a desire to gain further time in which to undermine its support. Under these circumstances, the fact that a petition had been filed furnishes no defense to the refusal to bargain" (*id.*).

C. The Decision of the Court Below

The court below in a *per curiam* opinion enforced the collective bargaining provisions of the Board's order. In approving the Board's rejection of petitioners' contention, the court noted that "the propriety of the bargaining units was a matter for the Board and the Union unquestionably had a majority status in each of the units involved" (R. 177). The court further observed that petitioners

"made no attempt to ascertain whether or not the union represented a majority of employees in an appropriate unit but declined to bargain when request was made by the union and engaged in unfair labor practices in an attempt to get rid of it as a bargaining representative" (R. 177). Quoting from its earlier decision in *National Labor Relations Board* v. *Clarksburg Publ. Co.*, 120 F. 2d 976, 980, the court stated (R. 178): "Where the real attitude of an employer is that he will not bargain collectively with his employees under any conditions, he cannot excuse himself on the ground that sufficient proof of a majority status was not furnished him [citing cases]. This holding applies with equal force to the second excuse of the company that the [unit chosen] constituted an inappropriate unit for bargaining purposes."

ARGUMENT

1. Petitioners' basic contention that an employer's duty to bargain arises only after Board determination of the apropriate unit and of the union's majority status has long been rejected as "untenable" (*National Labor Relations Board* v. *Piqua Munising Wood Products Co.*, 109 F. 2d 552, 556 (C. A. 6)) and "frivolous" (*National Labor Relations Board* v. *Dahlstrom Metallic Door Co.*, 112 F. 2d 756, 757 (C. A. 2)), and poses no issue warranting review by this Court. Where, as here, the union in fact represents a majority of the employees and the employer does not have a *bona*

fide doubt of that fact, it may not insist on Board certification as a prerequisite to bargaining, particularly where, as here, it at no time challenges the union's claim to represent the employees but counters the request for bargaining with a series of discriminatory discharges and other unfair labor practices intended to dissipate the union's majority. *Joy Silk Mills* v. *National Labor Relations Board,* 185 F. 2d 732, 741 (C. A. D. C.), certiorari denied, 341 U. S. 914; *National Labor Relations Board* v. *National Seal Corp.*, 127 F. 2d 776 (C. A. 2); *National Labor Relations Board* v. *Clarksburg Publishing Co.,* 120 F. 2d 976, 980 (C. A. 4); see also, *Lebanon Steel Foundry* v. *National Labor Relations Board*, 130 F. 2d 404, 409 (C. A. D. C.), certiorari denied, 317 U. S. 659; *National Labor Relations Board* v. *Federbush Co.*, 121 F. 2d 954, 956 (C. A. 2); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 868 (C. A. 2), certiorari denied, 304 U. S. 576, 585; *Idaho Potato Growers* v. *National Labor Relations Board*, 144 F. 2d 295, 307 (C. A. 9), certiorari denied, 323 U. S. 769.

2. Petitioners did not ascribe their refusal to bargain to any doubt as to the appropriateness of the unit but simply ignored the Union's bargaining requests and set about to break the Union.[4]

[4] Petitioners claimed that the term "technical employees," used by the Union in its bargaining requests, did not clearly describe the unit sought. Since petitioners classify only the studio and transmitter operators as "technical employees" (R. 9; 87, 103, 104), the Board was plainly right in rejecting

Since petitioners' refusal to bargain was motivated by their hostility to the Union and not by any doubts as to the unit, they cannot now defend their illegal refusal on the ground that the Board's prior unit determination (Pet., 4-5) *could* have furnished grounds for a *bona fide* doubt. See cases cited, *supra*.[5] Petitioners apparently do not challenge the propriety of the Board's unit finding in this case. In any event, the unchallenged facts set forth in the Board's decision (B. A. 7, 39-41) clearly show that, as the court below held, that finding was a reasonable exercise of the Board's discretion. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146, 152; *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 134; *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 380.

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this claim. Moreover, as the Board pointed out (R. 9), petitioners could have resolved any doubts by asking the Union to clarify its position.

[5] The prior unit determination was not binding upon the Board. *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 485, 491-493; *National Labor Relations Board* v. *Calumet Steel Division of Borg-Warner Corp.*, 121 F. 2d 366, 369-370 (C. A. 7).

CONCLUSION

The decision of the court below is plainly correct and presents neither a conflict of decisions nor any important issue warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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DECEMBER, 1951.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 151, *et seq.*) are as follows:

* * * * *

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any dis-

trict court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such

additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

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